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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 773

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,

*Petitioner,*

*against*

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,

*Respondents,*

*and*

BEN B. GREENE, INC.,

*Defendant.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, J. A. Edwards & Co., Inc. (use plaintiff and appellant below), respectfully prays that a writ of certiorari issue to review the judgment (Appendix A) of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court of the United States for the Eastern District of New York (Bruchhausen, D. J.).

## Opinions Below

The opinion of the District Court is reported in 174 F. Supp. 264 (25a-28a).* The opinion of the Court of Appeals is not yet reported and is hereto annexed (Appendix B).

## Jurisdiction

The judgment of the Court of Appeals was dated and entered December 16, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C., §1254.

## Questions Presented

1. Whether in a Miller Act suit on a surety's bond (40 U.S.C., §270b[a]), a distinction exists in favor of a subcontractor's materialman on a Government project making periodic deliveries to said project under a single contract, and a materialman making such deliveries under a series of separate, independent orders issued by said subcontractor?

2. Whether a lapse, in excess of four (4) months, between the last delivery and the one preceding it, invalidates a Miller Act claim of an unpaid materialman on a Government project, who made deliveries thereto under separate orders over a 6½ month period and who gave notice of its claim, sufficient in form, to the prime Government contractor, within ninety (90) days of the last delivery?

3. Whether the letters dated January 9, 1957 (Pl. Ex. 13; 35a), January 21, 1957 (Pl. Ex. 14; R. 31; Pl's. Reply Brief, p. 9) and April 5, 1957 (Pl. Ex. 12; 7a), when read together, constituted sufficient written notice under the Miller Act so as to entitle petitioner, as an unpaid materialman, to recover the value of material concededly delivered to the Government project here involved?

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* The letter "R" signifies references to the District Court record; the letter "a", references to the Court of Appeals appendices.

## Statute Involved

**49 Stat. 794 (1935), Title 40, U.S.C., §270b. "Same; right of persons furnishing labor or material.**

**(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.**

**(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."**

## Statement of Case and Disposition Below

This case presents for the Court's consideration a judicial construction of the Miller Act (40 U.S.C., §270b) against the following fact pattern and the dispositions made below:

The petitioner, a wholesale distributor of electrical material with offices in New York City, commenced this action upon a Miller Act surety bond on J[redacted]1957, in the United States District Court, Eastern D[redacted]rict of New York, to recover a balance of $6,274.44 for electrical material concededly delivered at the instance of a subcontractor, to a United States Government Nike site, located at Lido Beach, Long Island, New York, and known as "Special AAA Facilities, Lido Beach, N. Y.". There were named as defendants in this action: (1) Ben B. Greene, Inc. (hereafter referred to as "Greene"), a subcontractor with whom petitioner had a direct contractual relationship; (2) Peter Reiss Construction Co., Inc. (hereafter referred to as "Reiss"), who was the prime Government contractor and the principal named in the bond, and (3) The Travelers Indemnity Company (hereafter referred to as "Surety"), the surety on said Miller Act bond.

The petitioner's complaint in the District Court sought judgment, in contract, against the defendant-subcontractor and on the Miller Act surety bond, as against the respondents', Reiss and the Surety. The defendant-subcontractor defaulted and judgment was thereupon duly entered against it in the sum of $7,232.93, which included interest (R. 414-417).

The answer of the respondents Reiss and the Surety contained no separate or special defenses.

The case was tried to District Judge Bruchhausen on December 8, 9 and 10, 1958, without a jury. Petitioner's complaint was dismissed after trial, upon the sole ground that

petitioner failed to prove the delivery, under the prime contract, on March 5, 1957, of a safety switch valued at $15.90 (27a), therefore invalidating, as untimely, petitioner's 90-day Miller Act notice of April 5, 1957, found to have been served in proper form, upon the prime contractor (Appendix B; p. 20). The Court of Appeals affirmed the judgment upon grounds neither urged nor discussed by the District Judge (Appendix B; p. 21). The District Judge specifically stated that judgment would have been awarded to the petitioner if such delivery had been proven (27a), yet Finding No. 18 (25a) by the District Judge conclusively established such delivery, i.e., the District Judge obviously erred seriously. Thus, the case came to the Court of Appeals, without visible support for the District Court judgment.

On November 17, 1955, respondent Reiss, as general contractor, entered into a prime contract with the United States Government for the general construction of the aforesaid Nike site, at a contract price of $844,037.00 (Pl. Ex. 1; R. 22). Pursuant to the Miller Act, the respondents Reiss and the Surety executed their payment bond "conditioned that if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work, provided in said contract, and any and all duly authorized modifications of contract that might thereafter be made, then the obligation be void; otherwise to remain in full force and effect" (Pl. Ex. 1; R. 22).

On December 8, 1955, the respondent Reiss, as prime contractor, entered into a written subcontract with the defendant Greene in the sum of $76,000.00, calling for the performance by Greene of the electrical work and the furnishing of electrical material under the prime contract (Pl. Ex. 2; R. 13).

The subcontractor Greene, by a series of orders, ordered from the petitioner the aforesaid electrical material. The

petitioner, in turn, caused the said material to be delivered to the job, on the dates and in the amounts, hereinafter set forth (R. 59-78; Appendix B, p. 19; 32a-33a).

| Exhibit No. | Date 1956 | Invoice No. | Amount |
|---|---|---|---|
| 3 | Aug. 24 | 6824 | $8,109.53 |
| 4 | Sept. 25 | 7181 | 1,676.00 |
| 5 | Oct. 8 | 7338 | 31.24 |
| 6 | " 15 | 7403 | 34.40 |
| 7 | " 19 | 7475 | 686.00 |
| 8 | " 24 | 7522 | 224.20 |
| 9 | " 31 | 7592 | 89.00 |
| | 1957 | | |
| 10 | Mar. 5 | 9278 | 15.90 |
| | Total amount shipped ..... | | $10,766.27 |
| | Credit: Mar. 1, 1957 ..... | | 4,491.83 |
| | Balance due and in suit ..... | | $ 6,274.44 |

The last delivery involved in this action, made on March 5, 1957, consisted of the safety switch. Thereafter the petitioner made three separate deliveries, aggregating $204.81 (evidence of 3 deliveries excluded, R. 27; 143).

On January 9, 1957, the subcontractor Greene wrote the prime contractor Reiss, requesting that moneys due Greene from Reiss, be paid to the petitioner, J. A. Edwards & Co., Inc., and that said payments be charged to Greene under the subcontract (Pl. Ex. 13; R. 35a). Greene claimed a balance then due of $11,241.42, referable to the Government project here involved. Greene at that time owed petitioner for materials delivered to this particular project the sum of $10,750.37 (Pl. Exs. 5-9, incl.; R. 24-26).

On January 21, 1957, respondent Reiss wrote Greene requesting, from Greene, proof of petitioner's delivery of material to the job (Pl. Ex. 14; R. 31; Pl. Reply Brief, p. 9). (Greene, by affidavit, sworn to February 21, 1957, showed a balance then due petitioner of $10,750.37. This affidavit was excluded by the District Judge [R. 203-4; 239-40; 254-5; 279-81 and 32-3].)

On January 31, 1957, Greene wrote to Reiss enclosing invoices covering petitioner's deliveries of material to the job, showing a sum due petitioner of $10,919.13 as of that date and demanding payment of the sum of $11,241.42 previously claimed under the January 9th letter (Letter excluded, R. 33).

On February 26, 1957, Reiss issued its check to Greene in the sum of $4,491.83. Greene, in turn, endorsed the said check over to petitioner (Deft. Ex. F; R. 249—Check #1139). This payment was credited to Greene's account with petitioner on the job here involved (Appendix B, p. 19, infra).

On April 5, 1957, the petitioner, as an unpaid materialman, sent the Miller Act 90-day written notice to Reiss and the Surety, certified mail. Its receipt was duly acknowledged by the respondents (7a; 9a). The District Judge and the Court of Appeals held that this notice was proper in form (27a; Appendix B, infra, p. 20).

There was a lapse of more than four (4) months between the safety switch delivery on March 5, 1957, and the delivery immediately preceding it, made on October 31, 1956. The District Judge's opinion dismissing petitioner's complaint, so far as here material, states (27a):

"* * *

"A subcontractor, such as the plaintiff, may not recover under the Miller Act unless it delivers materials or performs labor, called for by the terms of the prime

contract, and also serves the notice within ninety days after the date of such delivery or performance. See United States, for Use of Bourquin v. Chester Construction Co., 104 F. 2d 648; United States, for Use of General Electric Supply Corp. v. Hershon Co., 52 F. Supp. 832. Hence, the plaintiff was obligated to prove that it caused a delivery of material, called for by the terms of the prime contract, to be made to Greene within the period of ninety days preceding the date of service of the notice.

"Concededly, a delivery of such material was made on October 31, 1956. If that date was the last time such contract material was delivered then the notice of April 5, 1957 was too late and not within the ninety days' period.

"The plaintiff claims a later delivery, the delivery of a switch costing $15.90, on March 5, 1957. This claim is the principal issue in the case. If sustained, the notice of April 5, 1957 would have been timely, as within the ninety days' provision.

"The plaintiff's proof is most unsatisfactory and unconvincing. It makes a desperate and futile effort to tie in this minor item with the prime contract. * * *"

The proof was overwhelming that the $15.90 safety switch was in fact delivered on March 5, 1957, and that it was tied in with the prime Government contract. (See Finding No. 18 (25a) and respondents' concession in the Court of Appeals.)

## Finding.

Finding No. 18. "That by separate purchase order numbered 2311 dated February 20, 1957 Ben B. Greene, Inc. ordered a Safety Switch SU-221 from plaintiff, for which Ben B. Greene, Inc. agreed to pay plaintiff the sum of $15.90, which safety switch was delivered to Ben B. Greene, Inc., at the 'Nike Project' on or about March 5, 1957."

**Concession (Respondents' Brief—Court of Appeals, p. 4)*.**

> "* * * The fact is that there never was any question about the delivery of the switch in question nor that it was used in connection with the prime contract. That was expressly found by the Court on the appellee's request, being Finding of Fact No. 18. * * *"

Subsequent to the dismissal of petitioner's complaint in the District Court, District Judge Zavatt, in the same Court, in another case, found judgment for petitioner involving the same subcontractor Greene, the same attorneys, and the same legal principles (*U. S. A.* for use and benefit of *J. A. Edwards & Co., Inc. v. Bregman Construction Corp.* (E.D., N.Y.), 172 F. Supp. 517, April 23, 1959). The *Bregman* judgment was paid in full and not appealed.

On March 13, 1959, District Judge Watkins, sitting in the District Court for the District of Maryland, decided the case of *U. S. A.* to the use of *Noland Company* v. *Allied Contractors*, 171 F. Supp. 569. In that case, a materialman's Miller Act claim, based upon several independent orders and not upon an entire contract, was dismissed by reason of the materialman's failure to give separate 90-day notices after each delivery.

The decision in *Noland* was diametrically opposite to the decision by District Judge Zavatt in *Bregman*.

On petitioner's appeal to the Court of Appeals, the respondents below leaned heavily upon the District Court opinion in the *Noland* case, which was then on appeal to the

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* The opinion of the Court of Appeals assumed, without specifically discussing the point, that delivery of the switch had been made pursuant to the requirements of the prime Government contract (Appendix B pp. 19, 21).

Court of Appeals, Fourth Circuit (Appendix B, pp. 20-21). Respondents argued that *Noland* was "directly in point" (Respondents' Brief, p. 12). *Noland* was reversed on December 24, 1959, i.e., subsequent to the decision below by the Court of Appeals on December 16, 1959. The Fourth Circuit cited and quoted *Breyman* (Zavatt, D. J., supra), as a sustaining authority (—— F. 2d ——).

With the reversal of *Noland* by the Court of Appeals, Fourth Circuit, respondents' main judicial prop disappeared. The Court of Appeals below recognized that the District Court opinions in *Breyman* and *Noland* represented mutually antagonistic judicial views (Appendix B, p. 20).

## Reasons for Granting the Writ

1. The decision of the Court of Appeals below, in the instant case, is in direct and irreconcilable conflict with the later decision of the Court of Appeals, Fourth Circuit, in the case of *U. S.* to the use of *Noland Company* v. *Allied Contractors*, —— F. 2d —— (decided 12/24/59, rev'g 171 F. Supp. 569 [D. Md., March 13, 1959]). This conflict, on an important Federal question, should be finally and authoritatively settled by the Supreme Court.

The decision below holds that a Miller Act notice, given within 90 days of the last delivery to a Government project, is insufficient to impose liability for all deliveries to said project, where more than 90 days elapses between the last delivery and the preceding delivery, such deliveries having been made under separate, independent orders, issued by the subcontractor to the materialman. This decision necessarily and irresistibly leads to the conclusion, as argued successfully below by the respondents (Respondents' Brief, Court of Appeals, p. 24), that a materialman of a subcontractor must, perforce, serve separate 90-day notices, in such cases, after each delivery, to preserve his cause of action on the statutory

bond under the Miller Act. Judge Soper, writing in the *Noland* case (supra), said:

> "Moreover, the Miller Act lends itself to the alternate construction that if all the goods in a series of deliveries by the materialman to a subcontractor are used on the same government project the notice is in time as to all of the deliveries if it is given within 90 days from the last delivery."

The holding below is also in apparent conflict with the following cases, in each of which a single Miller Act notice was given within 90 days of the last delivery, even though said deliveries were made under separate, independent orders: *Apache Powder Co.* v. *Ashton Co., Inc.*, 264 F. 2d 417 (9th Cir., 1959); *Bruce Construction Corp.* v. *U. S.* for use of *Westinghouse Electric Supply Co.*, 242 F. 2d 873 (5th Cir., 1957); *Fourt* v. *U. S.* for use of *Westinghouse Electric Supply Co.*, 235 F. 2d 433 (1st Circuit, 1956); *Moyer* v. *U. S.* for use of *Trane Co.*, 206 F. 2d 57 (4th Cir., 1953); *Glassell-Taylor Co.* v. *Magnolia Petroleum Co.*, 153 F. 2d 527 (5th Cir., 1946).

It is apparent, therefore, that the principle enunciated by the Court of Appeals below is in direct conflict with relevant, existing case law, construing the Miller Act.

2. The decision below, contrary to the obvious Congressional intent, creates an artificial distinction between a materialman making deliveries to a Government project under separate orders, at the instance of a subcontractor, and a materialman making such deliveries under a single, overall contract. The Court of Appeals, in stressing this artificial, non-existent distinction, said (Appendix B, p. 19):

> "The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an overall contract."

There is little practical difference between the facts at bar and the facts in *U. S.* for the use and benefit of *P. A. Bourquin & Co., Inc.* v. *Chester Construction Co., Inc.*, 104 F. 2d 648 (2nd Cir., 1939), affirming a plaintiff's judgment where a hiatus existed in the delivery dates, and the last item of work performed amounted to $14.50, out of a total claim of $875.00. The Court of Appeals below, in effect, did not follow its own decision in *Bourquin*.

The Court below attempted to distinguish *Bourquin* from the case at bar, upon the ground that *Bourquin* involved a single contract and not separate orders—a distinction which finds no comfort or support in the language of the Miller Act.

That this apparent distinction violates the spirit and intent of the Miller Act is evident from a cursory reading of the statute and the opinion of reversal in the *Noland* case (supra), which, so far as material holds, quoting *Bregman*:

> "• • • The 90 day period is not stated to be measured from the date of the last delivery of material under an entire contract or on a running account or under each separate order. The Miller Act contemplates one such notice within 90 days from the furnishing of the last material furnished in the prosecution of the prime contract from which claim is made. If the material is so furnished pursuant to one entire contract, obviously the measuring date will be the date when the last material is so furnished. If the material is furnished pursuant to a series of separate contracts, the measuring date will be the date when the last material is furnished under the last contract. This is the internal sense of the Miller Act. It should be construed sensibly and its plain purposes should not be defeated by a narrow interpretation."

Apparently to the same effect: *Cooley* v. *Barten & Wood, Inc.*, 249 F. 2d 912 (1st Cir., 1957).

Significantly, the Court below cited no sustaining authorities in support of its views. Indeed, it expressly refrained from quoting any Miller Act language to support its decision. This is rather unusual, in a judicial opinion construing a statute.

The Miller Act was derived from State lien statutes. It was designed to afford substantially similar protection to those furnishing labor and material on Government projects: *U. S.* v. *Munsey Trust Co.*, 332 U. S. 234; *U. S.* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; *U. S.* for use of *Gibson* v. *Harman*, 192 F. 2d 999 (4th Cir., 1951).

The main question involved on this petition, namely, the apparent distinction between deliveries under a single contract and under several, independent orders, has been the subject of judicial analysis in state decisions construing lien statutes similar in purpose and scope to the Miller Act. These decisions uniformly reject the reasoning of the Court of Appeals at bar and support petitioner's contentions: *Sandusky Grain Co.* v. *Borden's Condensed Milk Co.*, 214 Mich. 306, 183 N.W. 218 (Mich. Statutes Annotated, §26.285); *Union Trust Co.* v. *Casserly*, 127 Mich. 183, 86 N.W. 545; *American Bridge Co. of New York* v. *Honstain*, 120 Minn. 329, 139 N.W. 619 (Minn. Statutes Annotated, §514.08); *Milliken Bros.* v. *City of New York*, 201 N.Y. 65 (§10, Lien Law, Consol. Laws of N. Y.); *Chambers* v. *George Vassar's Sons & Co., Inc.*, 81 Misc. 562, 143 N.Y.S. 615; *Downingtown Mfg. Co.* v. *Franklin Paper Mills*, 63 N.J.L. 32, 42 Atl. 765 (N.J. Statutes Annotated, 2A:44-91).

3. The decision below seriously and adversely jeopardizes claimants' rights under the Miller Act, at the same time practically frustrating the effect of the recent Amendment to the Statute, enacted August 4, 1959 (Public Law, 86-135, 86th Congress, H. R. 4060). Under this Amendment, the one-year period of time, within which a Miller Act claimant may

commence action on the statutory bond, is no longer computed from the "date of final settlement of such contract", but rather "after the expiration of one year after the date on which the last of the labor was performed or material was supplied by him". The Statute was amended, so as to permit materialmen, etc., to determine from their own records, as distinguished from the Comptroller General's records, when the statute of limitations commences (Senate Report No. 551, July 21, 1959 [1st Session—86th Congress]).

Since the decision below virtually compels unpaid materialmen to serve separate statutory 90-day notices after each delivery, if the deliveries are made pursuant to separate, independent orders, the dilemma created by the decision of the Court of Appeals below is of serious proportions. The Statute provides (40 U.S.C.A. 270b[a]):

> "* * * Provided, however, That any person having direct contractual relationship with a subcontractor * * * shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, * * *."

There is no suggestion in the Statute that a materialman holding a single, overall contract for the delivery of materials to a Government project enjoys some special distinction or preference over a materialman making deliveries under several, independent orders to the same job.

The decision below considerably undercuts the purpose of the Amendment and injects chaos into an otherwise, clear statute. This is so, because the measuring date (both for service of 90-day notice and commencement of suit) is now completely shrouded in mystery. How does one define an independent order as distinguished from an overall contract? The decision below, because of the requirement of separate

notices, after each delivery, suggests a plethora of lawsuits affecting the same Government job and the same parties. Judge Zavatt, in *Breyman* (supra), stated that the construction of the statute "urged by the defendants would lead to absurd results" (furnishing examples). The rationale of the decision below is contrary to the pointed and specific rulings of the Supreme Court construing, in liberal fashion, the remedial Miller Act. The Act was designed primarily to assist materialmen, mechanics and laborers on Government projects, to recover the amount of their unpaid claims: *U. S.* for the benefit of *Sherman* v. *Carter*, 353 U.S. 210; *Clifford F. MacEvoy Co.* v. *U. S.* for use and benefit of *Calvin Tomkins Co.*, 323 U.S. 102.

4. The Court of Appeals below further erred seriously in disregarding the letters of January 9 and January 21, 1957 (Pl. Exs. 13 and 14), passing between the defendant-subcontractor and the respondent-general contractor, Reiss. These letters, admittedly sent and received within ninety days of the delivery of petitioner's material (other than the $15.90 safety switch on March 5, 1957), established requisite notice to the general contractor under the Miller Act within the meaning of the relevant case law construing said Statute: *Fleisher Eng. & Const. Co.* v. *U. S.* for the use and benefit of *Hallenbeck*, 311 U.S. 15 (1940); *Houston Fire & Cas. Ins. Co.* v. *U. S.* for use and benefit of *Trane Co.*, 217 Fed. 2d 727 (5th Cir., 1954); *Coffee* v. *U. S.* for the use and benefit of *Gordon*, 157 F. 2d 968 (5th Cir., 1946); *U. S.* for use of *Birmingham Slag Co.* v. *Perry*, 115 F. 2d 724 (5th Cir., 1940); *U. S.* for use and benefit of *Hopper Bros. Quarries* v. *Peerless Casualty Company*, 255 F. 2d 137 (8th Cir., 1958), cert. den. 358 U.S. 831; *McWaters and Bartlett* v. *U. S.* for the use and benefit of *Wilson*, 272 F. 2d 291 (10th Cir., 1959).

In *Houston*, the Court of Appeals said (p. 730):

> "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testi-

mony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

5. The narrow, restrictive interpretation of the Miller Act by the Court of Appeals below is inconsistent with, and does not take cognizance of, practices in the construction industry. The decision below fails to take into account that a substantial portion of material delivered to Government, as well as to private, construction jobs, is so delivered, pursuant to separate, independent orders, as distinguished from single, over-all contracts. That the questions here involved are important is evident from the fact that Governmental construction for each of the full years of 1957 and 1958 exceeded Three Billion Dollars (Construction Review, Feb. 1959 Issue, Vol. No. 5, No. 2, U. S. Department of Labor and U. S. Department of Commerce). Legitimate unpaid Miller Act claimants should be aided and not hindered in their attempts to enforce collection. This equates with the Congressional intent in the enactment of the statute:

## CONCLUSION

**For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Court of Appeals in this case.**

Dated: March 30, 1960.

Respectfully submitted,

IRVING LEVINE,
*Counsel for Petitioner,*
501 Fifth Avenue,
New York 17, N. Y.

# APPENDIX A

## JUDGMENT BELOW

## UNITED STATES COURT OF APPEALS
### FOT THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and fifty-nine.

Present:

HON. HAROLD R. MEDINA,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY, *Circuit Judges.*

---

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,
*Plaintiff-Appellant,*

*against*

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,
*Defendants-Appellees,*

*and*

BEN B. GREENE, INC.,
*Defendant.*

---

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

# APPENDIX B

## Opinion Below

## UNITED STATES COURT OF APPEALS

### FOR THE SECOND CIRCUIT

No. 73—October Term, 1959.

(Argued November 20, 1959 Decided December 16, 1959.)
Docket No. 25668.

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,
*Plaintiff-Appellant,*

*against*

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,
*Defendants-Appellees,*

*and*

BEN B. GREENE, INC.,
*Defendant.*

Before:

MEDINA, MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York, Walter Bruchhausen, Judge, 174 F. Supp. 264, dismissing an action by use plaintiff under the Miller Act to recover for material furnished to a government project, against the contractor and its surety. Affirmed.

IRVING LEVINE, New York, New York, for Plaintiff-Appellant.

DAVID MORGULAS, New York, New York (M. Carl Levine, Morgulas & Foreman, New York, New York, on the brief), for Defendants-Appellees.

FRIENDLY, *Circuit Judge*:

The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an over-all contract. Judge Bruchhausen, in a reasoned opinion, held the notice was given too late. We agree.

The use plaintiff here is the same as in United States for the use of J. A. Edwards & Company v. The Thompson Construction Corp., decided this day. The subcontractor likewise is the same, Ben B. Greene, Inc. The prime contractor and the contract are different. The contract was for a Nike site at Lido Beach, N. Y. Reiss was the prime contractor and it, as principal, and the Travelers Indemnity Company, as surety, executed the Miller Act payment bond. Reiss employed Greene as electrical subcontractor and Greene in turn ordered various electrical supplies from Edwards.

Plaintiff's brief summarizes plaintiff's claim for material furnished the project as indicated in the margin.[1] The brief

---

[1]

| Exhibit No. | Date 1956 | Invoice No. | Amount |
|---|---|---|---|
| 3 | Aug. 24 | 6824 | $8,109.53 |
| 4 | Sept. 25 | 7181 | 1,576.00 |
| 5 | Oct. 8 | 7338 | 31.24 |
| 6 | " 15 | 7403 | 34.40 |
| 7 | " 19 | 7475 | 686.00 |
| 8 | " 24 | 7522 | 224.20 |
| 9 | " 31 | 7592 | 89.00 |
| | 1957 | | |
| 10 | Mar. 5 | 9278 | 15.90 |
| | Total amount shipped | | $10,766.27 |
| | Credit: Mar. 1, 1957 | | 4,491.83 |
| | Balance due and in suit | | $ 6,274.44 |

states that the dates given are billing dates but that these coincide substantially with the delivery dates. Edwards did not have to furnish any specified portion of the electrical supplies; deliveries were made pursuant to individual purchase orders. As Edwards' vice-president testified, "We received orders, not an order."

On April 5, 1957 Edwards served a notice on Reiss by certified mail. The notice asserted a claim in the amount of $6,274.44 against Greene for electrical supplies furnished Greene at various times from on or about August 24, 1956 to March 5, 1957, for use in Greene's performance of contract obligations to Reiss for electrical work on the Lido Beach facility.

There is no question that the April 5, 1957 letter was proper in tenor. The question is whether it was proper in time. Edwards asserts that since the notice was served within 90 days of the March 5, 1957 delivery of a $15.90 switch, it was "within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made" and that it relates back to include all the earlier deliveries. Reiss and its surety, of course, deny this.

Judge Bruchhausen properly held Edwards' contention untenable. We are not here required to decide whether, when a materialman makes deliveries under a series of purchase orders so that each delivery is within 90 days of its predecessor, a notice given within 90 days of the last order or delivery will relate back to include the entire chain. Judge Zavatt so ruled in United States for the use of Edwards v. Bregman Construction Corp., 172 F. Supp. 517 (E.D.N.Y. 1959) but Judge Watkins held the contrary in United States to the use of Noland Co. v. Allied Contractors, 171 F. Supp. 569 (D. Md. 1959), which we are advised is now under appeal to the

Fourth Circuit. The question here is an easier one. In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provision of the Miller Act, as explained in our opinion in the Thompson case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval. Our decision in United States for the use of Borquin v. Chester Construction Co., 104 F. 2d 648 (2d Cir. 1939), in no way supports the plaintiff since that case concerned work done under a contract and not under a series of purchase orders.

In the District Court, Edwards relied also on a letter from Greene to Reiss dated January 9, 1957 identical, save for names, contract description and amount, with the letter of the same date from Greene to Thompson which figured in Thompson. For the reasons stated in our opinion in Thompson, plaintiff cannot sustain Miller Act liability of defendants on the basis of this letter.

Judgment affirmed.

## Proof of Service

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of March, 1960, I served three (3) copies of the foregoing petition for a writ of certiorari on the Respondents, Peter Reiss Construction Co., Inc. and The Travelers Indemnity Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorneys of record as follows: M. Carl Levine, Morgulas & Foreman, Esqs., 521 Fifth Avenue, New York 17, N. Y.

IRVING LEVINE,
*Counsel for Petitioner,*
501 Fifth Avenue,
New York 17, N. Y.

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 5 1960
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

**OCTOBER TERM, 1959**

**No. 773**

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

*Petitioner,*

—against—

PETER REISS CONSTRUCTION CO., INC.,
THE TRAVELERS INDEMNITY COMPANY,

*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID MORGULAS,
*Attorney for Respondents.*

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# Supreme Court of the United States

**OCTOBER TERM, 1959**

**No.**

---

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

*Petitioner,*

—against—

PETER REISS CONSTRUCTION CO., INC., THE TRAVELERS INDEMNITY COMPANY,

*Respondents.*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Opinions Below

The opinion of the District Court is reported in 174 F. Supp. 264. The opinion of the U. S. Court of Appeals for the Second Circuit is reported in 273 F. 2d 880.

### Jurisdiction

The jurisdiction of this Court is invoked by the Petitioner under the provisions of 28 U. S. C. § 1254.

## Questions Presented

Petitioner would have it appear that important and unique questions of law are presented by the decision of the Court below. Such a claim on petitioner's part is, naturally, obligatory since otherwise there would not have been even a pretense for the filing of the petition. The facts of the instant case, however, render it *sui generis* as to the main and only real issue involved, and the two side issues with which petitioner has gratuitously padded his statement of "Questions Presented" are wholly without merit, one having already been disposed of by this Court and the other being entirely spurious.

In stating the "Questions Presented" to this Court at page 2 of its petition, the petitioner has improperly stated that the main issue here involved is whether the Miller Act requires different treatment where materialmen deliver goods under separate, independent orders than where they furnish goods pursuant to a single contract. In fact, the Court of Appeals stated at the very outset of its opinion:

> "We are not here required to decide whether, when a materialman makes deliveries under a series of purchase orders so that each delivery is within ninety days of its predecessor, a notice given within ninety days of the last order or delivery will relate back to include the entire chain."

The petitioner, in his effort to have this Court assume jurisdiction, has set up the proverbial straw man in the hope that this Court may find some conflict between the instant decision and that of the Court of

Appeals in *Noland Co.* v. *Allied Contractors,* 273 F. 2d 917. The fact is, however, that the case here presented is wholly and completely *sui generis* and one which finds no counterpart in any case decided thus far in any court.

What the Court below held in our case was that where an insignificant independent delivery amounting to about $15 was made more than four months after the last previous total of $10,000 of deliveries, the delivery of $15 could not revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval. In fact the Court below specifically stated that the question before it was not the same as in *Edwards* v. *Bregman,* 172 Fed. Supp. 517, upon which the Court of Appeals in the Fourth Circuit predicated its reversal in *Noland Co.* v. *Allied Contractors,* (supra). As the Court below said, "The question here is an easier one." The Court below specifically stated that under the peculiar facts of this case it would be clearly beyond any conceivable liberal construction of the Miller Act to hold that petitioner could revive its claim after it had concededly lapsed, since no notice was sent within the 90-day period, by an insignificant delivery made some time after the lapse of 90 days after all of the prior deliveries. This is all the Court below found, and perhaps it is best to state the question in the language of the opinion of the Court below, viz.:

> "We are not here required to decide whether when a materialman makes deliveries under a series of purchase orders so that each delivery is within 90 days of its predecessor, a notice given within 90 days of the last order or delivery will

> relate back to include the entire chain. * * * The question here is an easier one. In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provisions of the Miller Act, as explained in our opinion in the Thompson case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval * * *."

Clearly, therefore, there is no question of conflict involved which would justify the petitioner's application.

Petitioner's other contention, that certain letters, originating not from the claimant but from a third party, were improperly excluded below, is wholly without merit. This exact question, i. e., whether notice by a subcontractor to the general contractor of the subcontractor's indebtedness to a materialman is sufficient notice *by the materialman*, under the Miller Act, was dealt with in the case of *Bowden* v. *United States*, 239 F. 2d 572, certiorari denied, 353

U. S. 957 (Dec. 31, 1956). The Court of Appeals had held in *Bowden* that the statutory requirement that notice be sent from the claimant to the general contractor was an absolute prerequisite to liability of the general contractor to the claimant under the Miller Act. On petition by the materialman to this Court, certiorari was denied.

## Statement

The petition contains such a distorted statement of the facts and such a misconstruction of the opinion of the Court below and the alleged "applicable case-law" that we are compelled to go to considerable length in order that this Court may have a clear picture both of the special and peculiar circumstances of this case and the reaction of the Court of Appeals thereto.

On November 17, 1955 respondent Reiss, as general contractor, entered into a contract with the United States of America for the construction of a Nike site at Lido Beach, New York. In accordance with the Miller Act, Title 40 U. S. C. A. 270b, Reiss as principal and the respondent Travelers as surety furnished the required payment bond.

Under date of December 8, 1955, respondent Reiss entered into a written subcontract with the defaulting defendant Greene as a subcontractor for the performance of the electrical work required by the general contract. Greene thereafter, from time to time, ordered some of the electrical material from petitioner. Seven concededly independent deliveries, aggregating $10,850.37, were made between August 24, 1956 and

October 31, 1956. After that followed over four months of silence and all claim under the Miller Act was clearly ended. On March 5, 1957 petitioner delivered a switch billed at $15.90 and it is this item which petitioner claims *revived* his right of claim, theretofore concededly ended, to embrace every item ever delivered by him to Greene.

Reference must be made at this point to the statement made at page 5 of the petition that the District Court specifically stated that judgment would have been awarded to the petitioner if delivery of the $15 item had been proven. This same spurious and impossible contention was made by petitioner in the Court below. Desperate indeed must be the petitioner's plight to again raise that question before this Court. Never have we seen a question on appeal so misrepresented by a litigant as it has been on this specific point. Nothing was further from the question presented to the Courts below and it should never have been suggested in this Court. The fact is that there was never any question about the delivery of the $15 switch, for this delivery was expressly found by the trial Court on the respondent's request, being Finding of Fact No. 18. That was never a question for determination on appeal. Petitioner pounced upon a somewhat inartistic expression found in the trial Court's opinion that the $15 item could not be connected with the previous deliveries, as a basis for his argument that the District Court found it had not been delivered, when that Court's very finding clearly indicated that it was delivered and we at all times so conceded. We respectfully submit that it is an imposition on this Court to again urge this impossible argument. In fact, the so-called "concession" ex-

tracted from respondent's brief and quoted on page 9 of the petition was in answer to this argument. Suffice it to say that the Court of Appeals fully recognized the spuriousness of this argument and concerned itself with the one real issue in this case, i. e., whether a delivery of an isolated and insignificant item after a lapse of over four months could revive a dead claim. As if this were not enough, petitioner proceeds to compound its misstatements by a reference to *U. S. for use and benefit of J. A. Edwards & Co., Inc.* v. *Bregman Construction Corp.*, 172 F. Supp. 517, and a statement that the *Bregman* case involved the "same legal principles" as this case. This is simply not so and the very opinion of the Court of Appeals so states. In *Bregman*, each delivery involved was well within 90 days of the one preceding it and, therefore, there was at no time a gap of over 90 days between successive deliveries.

The reversal in *Noland Co.* v. *Allied Contractors* (supra) is predicated on the *Bregman Construction Corp.* case, decided by Judge Zavatt sitting in the United States District Court for the Eastern District of New York. It is highly significant that the Court of Appeals in our case specifically stated that the principles of the *Bregman* case were not applicable to the instant case and declined to say whether that Court would or would not follow it if the case were on appeal before it. Furthermore, our case had been decided before the Court of Appeals for the Fourth Circuit decided the *Noland* case on December 24, 1959. Yet the Court of Appeals for the Fourth Circuit neither mentioned nor alluded to our case. If the Court of Appeals for the Fourth Circuit felt that there was any conflict it would be logical to

assume that some mention would have been made of our case when the Court went to the length of mentioning the *Bregman* case which was a trial court opinion in the Second Circuit. It is clear that the Court of Appeals for the Fourth Circuit felt that our case was *sui generis* to such an extent that it was not even worth mentioning in its opinion.

## Reasons for Denying Application for Writ

1. Petitioner first contends that its application for the writ should be granted because the decision of the Court of Appeals herein is in conflict with the decision of the Court of Appeals, Fourth Circuit, in *Noland* (supra) which expressly relied on Judge Zavatt's decision in the *Bregman* case. Petitioner is completely in error. All that was decided in the *Noland* and *Bregman* cases was that the fact that orders separate in form and not part of a single contract did not serve to invalidate a claim made within 90 days of the last of these items where it had been proven that all the items so delivered were closely related in time. The opinion of he Court of Appeals in our case expressly avoided any indication of what it would do were that question presented to it. the Court stating:

> "Judge Zavatt so ruled in *United States for the use of Edwards* v. *Bregman Construction Corp.*, 172 F. Supp. 517 (E.D. N. Y. 1959) but Judge Watkins held the contrary in *United States to the use of Noland Co.* v. *Allied Contractors*, 171 F. Supp. 569 (D. Md. 1959), which we are advised is now under appeal to the Fourth Circuit. The question here is an easier one. In this case

any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provisions of the Miller Act, as explained in our opinion in the *Thompson* case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval."

Since the primary basis for the application for the writ is predicated upon alleged conflict between decisions in the different circuits, it is most important to consider whether either of the Courts considered that there was any conflict in their decisions. We have already shown that the Court of Appeals of the Second Circuit held that our case was *sui generis* and that there was no conflict, expressly mentioning both the *Bregman* and *Noland* cases. We must next examine whether either Judge Zavatt in the *Bregman* case or the Court of Appeals for the Fourth Circuit in the *Noland* case considered their decisions in any manner in conflict with the previous decision both at Trial Term and the Court of Appeals in our case. It must be borne in mind that our case originated

in the trial court for the Eastern District of New York, just as did the *Bregman* case. The *Bregman* case was decided sometime after our case was decided by Chief Judge Bruchhausen. It would be just straining one's credulity to believe that Judge Zavatt in the *Bregman* case was not aware of Judge Bruchhausen's prior decision in the same Court. Judge Zavatt obviously felt there was no conflict between his decision and Judge Bruchhausen's decision in our case, otherwise he certainly would have mentioned it. By the same token, if the Court of Appeals for the Fourth Circuit considered that there was any conflict between its opinion and the opinion in our case, it would have made some mention of it; but none was made. Thus the alleged conflict upon which the application for the writ is based is a non-existent one created by the petitioner out of sheer necessity.

2. As its subsidiary reason for granting of the writ petitioner cites a considerable number of cases for the proposition that the decision of the Court below creates an artificial distinction between a materialman making deliveries to a government project under separate orders and a single overall contract. While we have already pointed out that the Court below did not predicate its decision on that point, we must, in view of petitioner's argument, answer it in kind.

At the very outset and in order to show what improper liberties petitioner has taken in its argument, we must refer to its citation of *P. A. Bourquin & Co.* v. *Chester Construction Co.*, 104 F. 2d 648 (2nd Circuit, 1939). In referring to this case petitioner says that the Court of Appeals below in effect did not

follow its own decision in the *Bourquin* case. How that statement could conceivably have been made had petitioner read the *Bourquin* case is just past belief. In the *Bourquin* case the Court of Appeals stated at p. 649.:

> "Bourquin's men left the job on January 28th, having completed all the work required by its subcontract except the furring and lathing for a cornice in the letter box lobby. No detail plan for such cornice construction was furnished until about the middle of April."

It was the aforesaid item of work, specifically part of the original subcontract, that was performed in April and which was sufficient to bring the subcontract balance within the ninety-day period. This is a point which petitioner chooses to completely ignore. It is the essential point of difference between the *Bourquin* case and our case where the last item delivered on March 5 was a completely independent order having nothing to do with the prior deliveries. As a matter of fact, in its very opinion in our case the Court of Appeals said:

> "Our decision in *United States for the use of Bourquin* v. *Chester Construction Co.*, 104 F. 2d 648 (2d Cir. 1939), in no way supports the plaintiff since that case concerned work done under a contract and not under a series of purchase orders."

It might be said that for over twenty years the principles of the *Bourquin* case have been well understood and followed in this jurisdiction.

All other authorities cited by the petitioner are clearly distinguishable.

*Apache Powder Co.* v. *Ashton Co. Inc.*, 264 F. 2d 417 involved a requirements contract by which a claimant supplied to a subcontractor all the blasting powder necessary for a road construction project. The original subcontractor withdrew and its place was taken, unknown to the claimant, by another corporation which had the same offices and officers. The sole question in the case was whether the amount due from the first, withdrawn, subcontractor was a proper part of the claim against the substituting subcontractor. The notice itself was given in proper form and well within 90 days. Orders were continuous and closely related in time.

*Fourt* v. *U. S. for use of Westinghouse Electric Supply Co.*, 235 F. 2d 433, involved only the question as to whether the 90 day period could run from date of delivery of materials which were not actually used on the project but rather went to replace inventory items in the subcontractors stock which were so used. Incidentally, all deliveries here were well within 90 days of each other, the entire job period extending only over 6½ months.

In *Moyer* v. *U. S. for use of Trane Co.*, 206 F. 2d 57, the point in issue was not even raised in the District Court, as the Appellate Court said at p. 61, viz.,

> "This contention was not made in the District Court and the evidence with respect to the deliveries was not taken with that point in mind."

There is nothing in the case to show whether the deliveries were the result of separate orders, the dates of such deliveries, nor their relation to each other, as under an original order or contract. What the Court

said in the *Moyer* case was accordingly wholly unnecessary to the decision of that case and constitutes no authority one way or the other.

*Glassell-Taylor Co.* v. *Magnolia Petroleum Co.*, 153 F. 2d 527, is completely distinguishable. Magnolia Petroleum Co., the use plaintiff, had supplied certain filling station tanks along the routes to and from the construction project site at the instance of one of the general contractor's subcontractors, who was himself involved in excavating and hauling work. Each morning, the trucks would fill up and go about the days business. On the trial, 127 invoices were introduced, covering sales for 127 days. The operation was a continuing one and no more than a day or two elapsed between each "delivery". Notice of claim was given twenty days after the last of the 127 consecutive deliveries of materials.

*Cooley* v. *Barten & Wood, Inc.*, 249 F. 2d 912, cited by petitioner, far from being in support of its position, vividly points out exactly the reasons why petitioner cannot prevail here. The Court there said:

> "It is essential for the purpose of the notice that it be given within a certain period. Therefore the giving of the notice within the ninety day period is a condition precedent of the plaintiff's right of action under the Miller Act. The reason for setting a time limit, such as this ninety day period, on the sending of notice to the principal contractor was made clear in *Bowden* v. *United States*, 9 Cir., 1956, 239 F. 2d 572, 577, 578, cert. den. *United States ex rel Malloy* v. *Bowden*, 1957, 353 U. S. 957, where it was stated: '* * * *It was the intent of Congress to fix a time limit*

*after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor.* * * * A brief letter from the supplier to the prime contractor will make certain and unambiguous the rights and liabilities of all concerned—the supplier, the prime contractor and the surety. *We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond.*" (Emphasis added.)

The Court there concluded by holding most emphatically against, not for, the claimant-materialman.

*American Bridge Co.* v. *Honstain,* 120 Minn. 329 (1908) simply construed Minnesota lien law as it then stood. In a much more recent and more apposite case, *Guy T. Bisbee* v. *Granite City Investing Corp.,* 159 Minn. 442, the court said, "A materialman who has completed his contract cannot extend the time for filing a lien by thereafter furnishing additional material for the mere purpose of continuing or reviving the lien." And in *Kahle* v. *McClary,* 255 Minn. 239 it was held that no revival of a mechanic's lien will be allowed when deminimus operations are performed for the sole purpose of extending the time for the lien.

*Union Trust Co* v. *Casserly,* 127 Mich. 183 (1901) gives only a general construction of the Michigan lien law, and sets out no schedules of deliveries whatsoever. It is impossible to tell from the decision, as

reported, what time periods elapsed between deliveries. Examination of other Michigan cases reveals that when faced with a factual situation actually analogous to the one here present, the Michigan courts take the same position as the Court of Appeals herein. See, e.g., *Hubbard* v. *Finch*, 262 Mich. 506.

*Sandusky Grain Co.* v. *Borden's Condensed Milk*, 214 Mich. 306, next cited by petitioner, contains no statement of the type, value or dates of delivery of the materials furnished and there is no way of telling, from the opinion as reported what the issue really was in this regard.

*Milliken Bros. Inc.* v. *City of N. Y.*, 201 N. Y. 65, is totally inapplicable. The only question here was whether the 30 day period in which a claimant had to file a notice of lien on a public improvement ran from "substantial" completion of the project or "actual" completion.

*Chambers* v. *George Vassar's Sons & Co.*, 81 Misc. 562 (N. Y.) merely construes the then N. Y. lien law relating to "last items" and has nothing whatever to do with the present situation.

There do, however, exist many state cases which petitioner has neglected to mention, all of which deal with factual situations closely analogous to the instant case, and which hold quite firmly that where separate independent orders are involved and there also occurs a considerable time gap between the bulk of the items delivered and an alleged "last item", claimant cannot recover.

In *Fitzpatrick* v. *Ernst*, 102 Minn. 195, there was no entire contract and separate bills were rendered

and paid on each item supplied. The Court held that the time period for filing liens ran from each item, not the alleged last of the group.

In *Hensel* v. *Johnson*, 94 Md. 729, the contract was for specified quantities of lumber at fixed prices, which were delivered periodically on order with no over-riding contract. The Court held that where a substantial time period had elapsed between the main group and the "last item" no recovery could be had except for that last item itself.

In *Lane & B. Co.* v. *Jones*, 79 Ala. 156, the Court concluded that where separate and distinct orders were involved and were widely spaced in time, recovery could be had only for the last item and not for those other items which had preceded it by a considerable length of time.

3. Under item "3" of Petitioner's "Reasons" (pp. 13-14), yet another non-sequitur is introduced. The recent amendment to the Miller Act, Pub. Law 86-135, which provides that the time period during which the claimant must commence action now runs from the date on which the "last of labor was performed or material was supplied by him", if anything, limits the claimant and repuires of him more, rather than less diligence, inasmuch as the date of final settlement invariably comes well after the date of last furnishing of labor and materials. In any event, the 90 day notice must precede the institution of the suit as a first prerequisite and as the two periods now run from the same date it is hard to see how a claimant could be prejudiced in any way.

4. Finally, and despite this Court's rejection of an application for a writ of certiorari in the *Bowden*

case (supra), petitioner again contends that the letter from the subcontractor, dated January 9, 1957, to the general contractor herein was sufficient notice of claim under the Miller Act. And again we are faced with the lamentably time-consuming task of showing that petitioner's impressive looking string of citations has nothing whatsoever to do with the question. We will refer to them but briefly. *McWaters & Bartlett* v. *U. S.*, 272 F. 2d 291, involved an itemized statement exhibited by the claimant to the general contractor during a conference which was held to be sufficient notice. *Coffee* v. *U. S.*, 157 F. 2d 968, similarly involved exhibition by the claimant himself of an itemized statement of claim and a discussion of it with the general contractor. *U. S. f/u/b Hopper Bros.* v. *Peerless Casualty Co.*, 255 F. 2d 137, simply held that a misplaced decimal point did not invalidate an otherwise proper notice sent by the claimant to the general contractor. *U. S. f/u/b Birmingham Slag* v. *Perry*, 115 F. 2d 724, held that ordinary mail in lieu of registered mail is sufficient where the notice is actually received, as did *Fleischer* v. *U. S. f/u/b Hallenbeck*, 311 U. S. 15. *Houston Fire & Casualty Co.* v. *U. S. f/u/b Trane Co.*, 217 F. 2d 727, held that oral notice by the claimant together with a written acknowledgment thereof by the general contractor was sufficient.

In not one of the cases cited by petitioner was the "notice" delivered by one other than the claimant himself. These cases were rejected as authority for petitioner's position not only by both courts below in this case, but by both District and Appellate courts in *U. S. f/u/b J. A. Edwards & Co., Inc.* v. *The Thompson Construction Corp., et al.*, 273 F. 2d 873, where the same group of cases was put forward in support

of the same proposition. Application for a writ has also been made to this court in the Thompson case.

## Conclusion

It cannot be overemphasized that the instant case is *sui generis*, presenting as it does a state of facts wholly apart from any to be found in the cases with which petitioner alleges it to be in conflict. Nowhere else is a hiatus of over four months found between all deliveries by a materialman and a subsequent unconnected, financially insignificant "last item". If this $15 item was absent the petitioner's rights under the Miller Act expired on February 1, 1957 without question. The Court of Appeals simply held that an item of $15 delivered during the subsequent month of March could not revive the petitioners' lapsed rights. There must be a reasonable cut-off date. It was not asking too much for the petitioner to file notice of non-payment within 90 days of October 31, 1956 when there was no further business during that time. It would be dangerous doctrine to permit revival of rights by a subsequent delivery. Where would the limit be, a lapse of 6 months, 1 year after a claimant's rights lapsed? It is respectfully submitted that this case is clearly *sui generis* and involves no conflict of general principles which require review by this Court.

**It is respectfully submitted that the petition for a writ of certiorari should be denied.**

DAVID MORGULAS,
*Attorney for Respondents.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 773

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,

*Petitioner,*

*against*

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,

*Respondents,*

*and*

BEN B. GREENE, INC.,

*Defendant.*

## PETITIONER'S REPLY BRIEF

IRVING LEVINE,
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## PETITIONER'S REPLY BRIEF

A. The respondents sprinkle invective on, and take exception to, petitioner's formulation of the questions presented for review. Respondents, however, disregard Rules 24 and 40 (Supreme Court Rules, 28 U.S.C.A.), by failing to submit their own version of such questions (Respondents' Brief, p. 2). This omission represents more than a technical transgression. It is intimately bound up with respondents' failure to meet the issues. Respondents' brief further omits references to the record or to the appendices below to sustain any of its arguments or contentions. Misstatements appear in respondents' brief, some of which may be pin-pointed, as follows:

(1) At page 3 (and again at page 6), respondents state that "the Court below * * * under the peculiar facts of this case" held that petitioner could not revive its claim by an insignificant delivery "after it had concededly lapsed, since no notice was sent within the 90-day period * * *." There was no such holding below and no such concession was made at any time. (See, also, Finding No. 18 and Respondents' concession in the Court of Appeals; Petition, pp. 8, 9.)

(2) At page 6, respondents state that after the October 31, 1956 delivery "there followed over four months of silence". Respondents completely ignore the letters dated January 9, 1957, January 21, 1957 and other correspondence engaged in after the October 31, 1956 delivery (Petition, pp. 2, 6, 7).

(3) At page 7, respondents argue that the Court of Appeals "concerned itself with the one real issue in this case, i.e., whether a delivery of an isolated and insignificant item after a lapse of over four months could revive a dead claim". *This is not the issue at bar and respondents cite no language from the opinion in support of such contention.* (See (4) and B (infra).)

(4) At page 10, respondents argue that the Court of Appeals below "did not predicate its decision" on the "artificial distinction between a materialman making deliveries to a government project under separate orders and a single overall contract". The opening sentence of the Court of Appeals decision is eloquent proof to the contrary (Petition, Appendix B, p. 19; see also Court's reference to its prior decision in Bourquin, Appendix B, p. 21).

B. The opinion below reveals that if, in a hypothetical case, petitioner, instead of delivering a safety switch on March 5, 1957 amounting to $15.90 had, instead, delivered electrical material aggregating $1,000 or more, judgment would, nevertheless, have gone for the respondents. This is so, because the

delivery would have been made under a separate order as distinguishd from an over-all contract and because more than 90 days elapsed between such hypothetical delivery on March 5, 1957 and the preceding delivery on October 31, 1956. The Court of Appeals' opinion makes this quite apparent (Petition, Appendix B, pp. 19, 20, 21):

> "The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an over-all contract. * * *"
>
> "On April 5, 1957 Edwards served a notice on Reiss by certified mail. The notice asserted a claim in the amount of $6,274.44 against Greene for electrical supplies furnished Greene at various times from on or about August 24, 1956 to March 5, 1957, for use in Greene's performance of contract obligations to Reiss, for electrical work on the Lido Beach facility."
>
> "* * * *In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957.* From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. * * *" (Italics supplied.)

C. In arriving at its decision, the Court of Appeals undoubtedly adopted the respondents' argument below, under their Point II, entitled: "The ninety-day notice requirement is for the general contractors' protection" (Respondents' Brief, Court of Appeals, p. 22). Respondents argued, under said Point II (Respondents' Brief, Court of Appeals, p. 24):

> "* * * Actually Edwards, having no contract with Greene except as each separate order was given should have given his notice within 90 days after the first shipment on August 24th amounting to $8,109.53."

It should be observed that the District Court held the Miller Act notice of April 5, 1957 insufficient for the sole reason that there was no proof that the safety switch amounting to $15.90 was tied in with the prime contract (Petition, pp. 7, 8). If it had been so tied in, judgment would have gone for the petitioner as the District Judge pointedly stated (27a):

> "Concededly a delivery of such material was made on October 31, 1956. If that date was the last time such contract material was delivered then the notice of April 5, 1957 was too late and not within the ninety days' period.
>
> *The plaintiff claims a later delivery, the delivery of a switch costing $15.90, on March 5, 1957. This claim is the principal issue in the case. If sustained, the notice of April 5, 1957 would have been timely, as within the ninety days' provision."* (Italics supplied.)

Significantly, the affirmance in the Court of Appeals, was upon grounds not even discussed by the District Judge (Petition, Appendix B, 19-21).

D. Respondents contend that the case at bar is *"sui generis* and one which finds no counterpart in any case decided thus far in any court" (Respondents' Brief, p. 3). In the Court of Appeals below, respondents argued quite differently (Respondents' Brief, Court of Appeals, pp. 12, 13):

> "United States of America to the use of Noland v. Allied Contractors is a case directly in point. In that case the Court was confronted with a situation where sales were made to a subcontractor from time to time without any fixed contract to furnish all of the materials required on the project. In short, the situation was exactly as in the case at bar, the subcontractor in both cases being free to buy its material anywhere and from anyone it chose. The sales in question were made pursuant to separate and distinct contracts or orders and were not the result of one undertaking to furnish all of the required materials for the job. In

short, it is almost an exact duplicate of the instant situation.

"In the cited case the notice was served on May 5, 1955. The record indicates (p. 571 of the Opinion) six separate sales beginning on December 28, 1954 and ending April 6, 1955. The Court held that the notice served on May 5, 1955 could only create liability for materials delivered within ninety days prior to May 5, 1955."

A comparative analysis of the opinions in Noland (4th Cir., CCA 273 F. 2d 917), Bregman and the case at bar, can only serve to generate uncertainty and confusion in the application of the Miller Act. It is respectfully submitted that this situation requires correction by the Supreme Court particularly since it affects all Governmental construction. Certainly, materialmen who deliver material to government projects under separate orders, issued by sub-contractors, should not be discriminated against, in favor of those delivering material under entire contracts. The Congress never intended such bizarre result.

## *CONCLUSION.*

***In view of the importance of the questions involved and the conflict of opinion between the different Circuit Courts of Appeal, a writ of certiorari should issue as prayed for in the petition.***

Dated: April 8, 1960.

Respectfully submitted,

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## Proof of Service.

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of April, 1960, I served three (3) copies of the foregoing Petitioner's Reply Brief on the Respondents, Peter Reiss Construction Co., Inc., and The Travelers Indemnity Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorney of record, David Morgulas, Esq., 521 Fifth Avenue, New York 17, N. Y.

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